

# Water Quality Issues in the 111<sup>th</sup> Congress: Oversight and Implementation

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## Summary

Although much progress has been made in achieving the ambitious goals that Congress established more than 35 years ago in the Clean Water Act (CWA) to restore and maintain the chemical, physical, and biological integrity of the nation's waters, long-standing problems persist, and new problems have emerged. Water quality problems are diverse, ranging from pollution runoff from farms and ranches, city streets, and other diffuse or "nonpoint" sources, to toxic substances discharged from factories and sewage treatment plants.

There is little agreement among stakeholders about what solutions are needed and whether new legislation is required to address the nation's remaining water pollution problems. For some time, efforts to comprehensively amend the CWA have stalled as interests have debated whether and exactly how to change the law. Congress has instead focused legislative attention on enacting narrow bills to extend or modify selected CWA programs, but not any comprehensive proposals.

For several years, the most prominent legislative water quality issue has concerned financial assistance for municipal wastewater treatment projects. House and Senate committees have approved bills on several occasions, but, for various reasons, no legislation has been enacted. At issue has been how the federal government will assist states and cities in meeting needs to rebuild, repair, and upgrade wastewater treatment plants, especially in light of capital costs that are projected to be as much as \$390 billion. In the 111<sup>th</sup> Congress, interest in increased investment in public works infrastructure—including wastewater—in order to stimulate the faltering U.S. economy brought greater attention to water infrastructure issues. Acting quickly, in February 2009, Congress passed and the President signed the American Recovery and Reinvestment Act (P.L. 111-5). Among its provisions, the legislation appropriated \$4.0 billion in additional CWA assistance for wastewater projects. In addition, in March 2009, the House passed legislation to reauthorize the CWA's State Revolving Fund (SRF) program to finance wastewater infrastructure and several related provisions of the act (H.R. 1262). A companion bill was approved by the Senate Environment and Public Works Committee (S. 1005). No legislation was enacted.

Programs that regulate activities in wetlands also have been of interest, especially CWA Section 404, which has been criticized by landowners for intruding on private land-use decisions and imposing excessive economic burdens. Environmentalists view this regulatory program as essential for maintaining the health of wetland ecosystems, and they are concerned about court rulings that narrowed regulatory protection of wetlands and about related administrative actions. Many stakeholders desire clarification of the act's regulatory jurisdiction, but they differ on what solutions are appropriate. In the 111<sup>th</sup> Congress, the Senate Environment and Public Works Committee approved a bill that sought to clarify but not expand the CWA's geographic scope (the Clean Water Restoration Act, S. 787). A companion bill was introduced in the House (H.R. 5088). Because some stakeholders believe that the bills would expand federal jurisdiction—not simply clarify it—the bills were controversial, and no legislation was enacted.

The 111<sup>th</sup> Congress considered a number of water quality issues through oversight and legislation. Two bills amending the CWA were enacted and are discussed. One dealt with extending a moratorium for CWA permitting of certain vessels (P.L. 111-215), and the other dealt with ensuring that federal agencies and departments pay localities for reasonable costs associated with managing stormwater pollution from federal properties (P.L. 111-378).

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## Introduction

Although much progress has been made in achieving the ambitious goals that Congress established more than 35 years ago to restore and maintain the chemical, physical, and biological integrity of the nation's waters, long-standing problems persist, and new problems have emerged. Water quality problems are diverse, ranging from pollution runoff from farms and ranches, city streets, and other diffuse or "nonpoint" sources, to "point" source discharges of metals and organic and inorganic toxic substances from factories and sewage treatment plants.

The principal law that deals with polluting activity in the nation's streams, lakes, estuaries, and coastal waters is the Federal Water Pollution Control Act (P.L. 92-500, enacted in 1972), commonly known as the Clean Water Act, or CWA. It consists of two major parts: regulatory provisions that impose progressively more stringent requirements on industries and cities to abate pollution and meet the statutory goal of zero discharge of pollutants; and provisions that authorize federal financial assistance for municipal wastewater treatment plant construction. Both parts are supported by research activities, plus permit and enforcement provisions. Programs at the federal level are administered by the Environmental Protection Agency (EPA); state and local governments have major day-to-day responsibilities to implement CWA programs through standard-setting, permitting, enforcement, and administering financial assistance programs.<sup>1</sup>

The water quality restoration objective declared in the 1972 act was accompanied by statutory goals to eliminate the discharge of pollutants into navigable waters by 1985 and to attain, wherever possible, waters deemed "fishable and swimmable" by 1983. Although those goals have not been fully achieved, considerable progress has been made, especially in controlling conventional pollutants (suspended solids, bacteria, and oxygen-consuming materials) discharged by industries and sewage treatment plants.

Progress has been mixed in controlling discharges of toxic pollutants (heavy metals, inorganic and organic chemicals), which are more numerous and can harm human health and the environment even when present in very small amounts—at the parts-per-billion level. Moreover, efforts to control pollution from diffuse sources, termed nonpoint source pollution (rainfall runoff from urban, suburban, and agricultural areas, for example), are more recent, given the earlier emphasis on "point source" pollution (discharges from industrial and municipal wastewater treatment plants). Overall, data reported by EPA and states indicate that 45% of river and stream miles assessed by states and 47% of assessed lake acres do not meet applicable water quality standards and are impaired for one or more desired uses.<sup>2</sup> In 2006 EPA issued an assessment of streams and small rivers and reported that 67% of U.S. stream miles are in poor or fair condition and that nutrients and streambed sediments have the largest adverse impact on the biological condition of these waters.<sup>3</sup> Approximately 95,000 lakes and 544,000 river miles in the United States are under fish-consumption advisories (including 100% of the Great Lakes and their connecting waters), due to chemical contaminants in lakes, rivers, and coastal waters, and one-third of shellfishing beds are closed or restricted, due to toxic pollutant contamination. Mercury is a contaminant of growing concern—as of 2003, 45 states had issued partial or statewide fish or shellfish consumption advisories because of elevated mercury levels.

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<sup>1</sup> For further information, see CRS Report RL30030, *Clean Water Act: A Summary of the Law*, by Claudia Copeland.

<sup>2</sup> U.S. Environmental Protection Agency, *National Water Quality Inventory: Report to Congress, 2002 Reporting Cycle*, EPA 841-R-07-001, October 2007, <http://www.epa.gov/305b/2002report/>.

<sup>3</sup> U.S. Environmental Protection Agency, *Wadeable Streams Assessment: A Collaborative Survey of the Nation's Streams*, EPA 841-B-06-002, December 2006, <http://www.epa.gov/owow/streamsurvey/>.

The last major amendments to the law were the Water Quality Act of 1987 (P.L. 100-4). These amendments culminated six years of congressional efforts to extend and revise the act and were the most comprehensive amendments since 1972. Authorizations of appropriations for some programs provided in P.L. 100-4, such as general grant assistance to states, research, and general EPA support authorized in that law, expired in FY1990 and FY1991. Authorizations for wastewater treatment funding expired in FY1994. None of these programs has lapsed, however, as Congress has continued to appropriate funds to implement them. EPA, states, industry, and other citizens continue to implement the 1987 legislation, including meeting the numerous requirements and deadlines in it.

The Clean Water Act has been viewed as one of the most successful environmental laws in terms of achieving its statutory goals, which have been widely supported by the public, but lately some have questioned whether additional actions to achieve further benefits are worth the costs. Criticism has come from industry, which has been the long-standing focus of the act's regulatory programs and often opposes imposition of new stringent and costly requirements. Criticism also has come from developers and property rights groups who contend that federal regulations (particularly the act's wetlands permit program) are a costly intrusion on private land-use decisions. States and cities have traditionally supported water quality programs and federal funding to assist them in carrying out the law, but many have opposed CWA measures that they fear might impose new unfunded mandates. Many environmental groups believe that further fine-tuning is needed to maintain progress achieved to date and to address remaining water quality problems.

Initially following enactment of amendments in 1987, no major CWA legislative activity occurred. In the 104<sup>th</sup> Congress (1995), the House passed a comprehensive reauthorization bill that was opposed by the Clinton Administration and environmental groups; it was not enacted. Since then, no comprehensive reauthorization legislation has been introduced, but beginning in the 106<sup>th</sup> Congress, a number of bills dealing with specific water quality issues in the law have been enacted—especially, legislation to reauthorize several existing CWA programs.<sup>4</sup> Since the 107<sup>th</sup> Congress, one of the dominant CWA issues has been water infrastructure financing—that is, extension and modification of provisions of the act authorizing financial assistance for municipal wastewater treatment projects. House and Senate committees have approved bills and the House passed bills in the 110<sup>th</sup> and 111<sup>th</sup> Congresses, but none has been enacted.

The remainder of this report discusses CWA issues of particular interest in the 111<sup>th</sup> Congress, beginning with discussion of two issues that were prominent—water infrastructure funding, and regulatory protection of wetlands. It then describes several other issues that also received attention. It concludes with a discussion of water quality appropriations and water infrastructure as part of economic stimulus legislation in 2009.

## **Legislative Issues in the 111<sup>th</sup> Congress**

The year 2007 marked the 35<sup>th</sup> anniversary of passage of the Clean Water Act and 20 years since the last major amendments to the law. While, as noted, there has been measurable clean water progress as a result of the act, observers and analysts agree that significant water pollution problems remain. However, there is less agreement about what solutions are needed and whether new legislation is required. Several key water quality issues exist: evaluating actions to implement existing provisions of the law, assessing whether additional steps are necessary to

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<sup>4</sup> For additional information on legislative activity since P.L. 100-4, see CRS Report RL33800, *Water Quality Issues in the 110<sup>th</sup> Congress: Oversight and Implementation*, by Claudia Copeland.

achieve overall goals of the act that have not yet been attained, ensuring that progress made to date is not lost through diminished attention to water quality needs, and defining the appropriate federal role in guiding and paying for clean water infrastructure and other activities. For some time, efforts to comprehensively amend the act have stalled as interests have debated whether and exactly how to change the law. Many issues that might be addressed involve making difficult tradeoffs between impacts on different sectors of the economy, taking action when there is technical or scientific uncertainty, and allocating governmental responsibilities among federal, state, local, and tribal entities for implementing the law.

These factors partly explain why Congress has recently favored focusing legislative attention on narrow bills to extend or modify selected CWA programs, rather than taking up comprehensive proposals. Other factors also have been at work. These include a general reluctance by most members of Congress to address controversial environmental issues in view of the slim majorities held by political parties in the House and the Senate; and a lack of presidential initiatives on clean water issues (neither the Clinton nor the Bush Administration proposed CWA legislation). In addition, for some time after the terrorist attacks of September 11, 2001, Congress was more focused on security, terrorism, and Iraq war issues than on many other topics, including environmental protection.

As a result of the 2006 mid-term elections and changed congressional leadership beginning in 2007, many observers expected that the 110<sup>th</sup> Congress would pursue oversight of clean water and other environmental programs. Greater interest in environmental issues was apparent, but no comprehensive legislation was enacted. A particular legislative focus was water infrastructure financing legislation, specifically reauthorization of the act's financial aid program (discussed next in this report). Also on the congressional agenda was consideration of the geographic reach of the Clean Water Act over the nation's waters and wetlands, in light of court rulings—including two Supreme Court decisions—that have narrowed the law's regulatory jurisdiction, but in ways that are somewhat unclear.

The 2008 election encouraged many policymakers and stakeholders to anticipate much greater attention to environmental issues, including clean water, by the 111<sup>th</sup> Congress and the Obama Administration. During the 2008 presidential campaign, candidate Obama supported several issues, including preservation of wetlands, Great Lakes restoration legislation, water conservation, regulation of large animal feeding operations, and full funding of clean water infrastructure assistance programs. Funding for water infrastructure projects, discussed next in this report, received early attention in the 111<sup>th</sup> Congress in light of interest in utilizing increased investment in public works projects—including wastewater—in order to stimulate the faltering U.S. economy, but the Obama Administration did not present specific legislative proposals concerning water quality. As discussed below, the 111<sup>th</sup> Congress considered a number of water quality issues through oversight and legislation. Two bills amending the CWA were enacted and are discussed. One dealt with extending a moratorium for CWA permitting of certain vessels (P.L. 111-215), and the other dealt with ensuring that federal agencies and departments pay localities for reasonable costs associated with managing stormwater pollution from federal properties (P.L. 111-378).

## **Authorization of Water Infrastructure Funding**

Meeting the nation's needs to build, upgrade, rebuild, and repair wastewater infrastructure is a significant element in achieving the Clean Water Act's water quality objectives. The act's program of financial aid for municipal wastewater treatment plant construction is a key contributor to that effort. Since 1972 Congress has provided more than \$85 billion to assist cities in constructing projects to achieve the act's requirements for secondary treatment of municipal



sewage (equivalent to 85% reduction of wastes), or more stringent treatment where required by local water quality conditions. State and local governments have spent more than \$25 billion of their own funds for construction, as well. Federal funds can be used only for construction purposes (e.g., new plants or upgrades), but not for operation and maintenance of facilities.

Still, funding needs remain very high: an additional \$298 billion, according to the most recent Needs Survey estimate by EPA and the states, released in June 2010, a 17% increase above the estimate reported four years earlier.<sup>5</sup> This current estimate includes \$187.9 billion for wastewater treatment and collection systems (\$26.7 billion more than the previous report), which represent more than 60% of all needs; \$63.6 billion for combined sewer overflow corrections (\$1.4 billion less than the previous estimate); \$42.3 billion for stormwater management (\$17 billion more than the previous estimate); and \$4.4 billion to build systems to distribute recycled water (\$700 million less than the previous estimate).

EPA reported several reasons for increased total needs for wastewater treatment, which were \$23 billion higher than in the previous report: improvements needed to meet more protective water quality standards, rehabilitation of aging infrastructure, and expanding capacity to meet population growth. Needs for stormwater management increased by \$17 billion and were mostly due to emerging needs to provide “green” infrastructure, according to EPA. The estimates do not explicitly include funding needed to address security issues, or funding possibly needed for treatment works to adapt to climate change impacts.

In September 2002, EPA released a study called the Gap Analysis that assessed the difference between current spending for wastewater infrastructure and total funding needs (both capital and operation and maintenance).<sup>6</sup> In that report, EPA estimated that, over the next two decades, the United States needs to spend nearly \$390 billion to replace existing wastewater infrastructure systems and to build new ones. Funding needs for operation and maintenance (not eligible for Clean Water Act funding) are an additional \$148 billion over the next two decades, the agency estimated. According to the Gap Analysis, if there is no increase in investment, there will be about a \$6 billion gap between current annual capital expenditures for wastewater treatment (\$13 billion annually) and projected spending needs of approximately \$19 billion. The study also estimated that, if wastewater spending were to increase by 3% annually (essentially meaning a doubling of rates paid by ratepayers), the gap would shrink by nearly 90% (to about \$1 billion annually). At issue has been what the federal role should be in assisting states and cities, especially in view of such high projected funding needs.

In the 111<sup>th</sup> Congress, recognition of significant remaining funding needs for water infrastructure merged with consideration of legislation that would use federal government spending to stimulate recovery of the U.S. economy (see discussion of “Economic Stimulus” below, page 24).

Debate over the nature of the nation’s efforts regarding wastewater infrastructure was a central and controversial part of the 1987 amendments to the act. The amendments extended through FY1990 the traditional Title II program of grants for sewage treatment project construction, under which the federal share was 55% of project costs. The 1987 law initiated a program of grants to capitalize State Water Pollution Control Revolving Funds (SRFs), which are loan programs, in a new Title VI. States are required to deposit an amount equal to at least 20% of the federal capitalization grant in the Fund established under Title VI. Under the revolving fund concept, monies used for wastewater treatment construction are repaid by loan recipients to the states

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<sup>5</sup> U.S. Environmental Protection Agency, *Clean Watersheds Needs Survey 2008, Report to Congress*, Washington, June 2010, <http://water.epa.gov/scitech/datait/databases/cwns/upload/cwns2008rtc.pdf>.

<sup>6</sup> U.S. Environmental Protection Agency, *The Clean Water and Drinking Water Infrastructure Gap Analysis*, EPA 816-R-02-020, September 2002.

(repayment was not required for grants under the Title II program), to be recycled for future construction in other communities, thus providing an ongoing source of financing. The expectation in 1987 was that the federal contributions to SRFs would assist in making a transition to full state and local financing by FY1995. Although most states believe that the SRF is working well, early funding and administrative problems and continuing large funding needs have delayed the anticipated shift to full state responsibility, even as loans are being repaid to states. Thus, SRF issues have been prominent on the Clean Water Act reauthorization agenda in recent Congresses.<sup>7</sup>

SRF monies may be used for specified activities, including making loans for as much as 100% of project costs (at or below market interest rates, including interest-free loans), to buy or refinance cities' debt obligation, or as a source of revenue or security for payment of principal and interest on a state-issued bond. SRF monies also may be used to provide loan guarantees or credit enhancement for localities. Loans made by a state from its SRF are to be used first to assure progress towards the goals of the act and, in particular, on projects to meet the standards and enforceable requirements of the act. After states achieve those requirements of the act, SRF monies also may be used to implement nonpoint pollution management and national estuary programs. Since the SRF program began, states have used \$2.6 billion to assist more than 8,650 nonpoint management projects; none has gone to estuary management activities.

All states have established the mechanisms to administer the new loan programs and have been receiving SRF capitalization funds under Title VI. Many have complained that the SRF program is unduly complicated by federal rules that are intended in part to provide accountability for federal dollars, even though Congress had intended that states were to have greater flexibility. Congressional oversight has examined the progress toward reducing the backlog of wastewater treatment facilities needed to achieve the act's water quality objectives, while newer estimates of future funding needs have drawn increased attention to the role of the SRF program in meeting such needs. Although there has been some criticism of the SRF program, and debate continues over specific concerns, the basic approach is well supported. Congress used the clean water SRF as the model when it established a drinking water SRF in 1996 (P.L. 104-182).<sup>8</sup>

Although the initial intent was to phase out federal support for this program, Congress has continued to appropriate SRF capitalization grants to the states, providing an average of \$1.35 billion annually in recent years. **Table 1** summarizes wastewater treatment funding under Title II (traditional grants program) and Title VI (capitalization grants for revolving loan programs) since the 1987 amendments. This table does not include appropriations for congressionally earmarked special project grants in individual cities, which in recent years have represented about 15% of appropriated water infrastructure funds.<sup>9</sup>

**Table 1. CWA Wastewater Treatment Funding**

(billions of dollars)

Fiscal Year	Authorizations		Appropriations	
	Title II	Title VI	Title II	Title VI
1986	2.400	—	1.800	—

<sup>7</sup> For further information on the clean water SRF program, see CRS Report 98-323, *Wastewater Treatment: Overview and Background*, by Claudia Copeland.

<sup>8</sup> For additional information, see CRS Report RS22037, *Drinking Water State Revolving Fund (DWSRF): Program Overview and Issues*, by Mary Tiemann.

<sup>9</sup> Issues associated with special project grants are discussed in CRS Report RL32201, *Water Infrastructure Projects Designated in EPA Appropriations: Trends and Policy Implications*, by Claudia Copeland.



Fiscal Year	Authorizations		Appropriations	
	Title II	Title VI	Title II	Title VI
1987	2.400	—	2.360	—
1988	2.400	—	2.300	—
1989	1.200	1.200	0.941	0.941
1990	1.200	1.200	0.967	0.967
1991	—	2.400	—	2.100
1992	—	1.800	—	1.950
1993	—	1.200	—	1.930
1994	—	0.600	—	1.220
1995	—	—	—	1.240
1996	—	—	—	2.070
1997	—	—	—	0.625
1998	—	—	—	1.350
1999	—	—	—	1.350
2000	—	—	—	1.345
2001	—	—	—	1.350
2002	—	—	—	1.350
2003	—	—	—	1.341
2004	—	—	—	1.342
2005	—	—	—	1.091
2006	—	—	—	0.887
2007	—	—	—	1.084
2008	—	—	—	0.689
2009	—	—	—	0.689
2009 ARRA <sup>a</sup>	—	—	—	4.000
2010	—	—	—	2.100
TOTAL	7.200	8.400	6.568	33.011

**Source:** Compiled by CRS.

- a. The American Recovery and Reinvestment Act of 2009 (P.L. 111-5) provided \$4.0 billion in supplemental FY2009 appropriations. See discussion of “Economic Stimulus,” below.

One issue of continuing interest is impacts on small communities. These entities in particular have found it difficult to participate in the SRF loan program, since many are characterized by narrow or weak tax bases, limited or no access to capital markets, lower relative household incomes, and higher per capita needs. They often find it harder to borrow to meet their capital needs and pay relatively high premiums to do so. Meeting the special needs of small towns, through a reestablished grant program, other funding source, or loan program with special rules, has been an issue of interest to Congress.

Because remaining clean water funding needs are still so large nationally, at issue is whether and how to extend SRF assistance to address those needs, how to allocate SRF funds among the

states, and how to prioritize projects and funding. Additionally, there is concern about the adequacy of SRF or other funding specifically for high-cost projects dealing with problems of overflows from municipal combined and separate sewers which can release partially treated or untreated wastewaters that harm public health and the environment. EPA estimates that the cost of projects to control sewer overflows, from combined and separate sanitary sewer systems, and manage stormwater runoff, is nearly \$64 billion nationwide—nearly twice the total of SRF capitalization grants appropriated since 1987. And more recently, wastewater utilities have sought assistance to assess operational vulnerabilities and upgrade physical protection of their facilities against possible terrorist attacks that could threaten the water infrastructure system.<sup>10</sup>

During the Bush Administration, EPA officials took the position that infrastructure funding needs go beyond what the federal government can do on its own, and the President's budget for several years advanced the concept that federal funding would cease after 2011 and that state and local self-financing would occur thereafter. Although saying that federal and state funding can help water utilities meet future needs, EPA's principal water infrastructure initiative during that time was to support other types of responses to help ensure that investment needs are met in an efficient, timely, and equitable manner. In particular, EPA worked with water utilities to promote strategies based on concepts of better management, full-cost pricing, efficient water use, and watershed approaches to protection. EPA also has encouraged consumers to use water-efficient products (e.g., residential bathroom products), with the intent of reducing national water and wastewater infrastructure needs through conservation measures by reducing projected water demand and wastewater flow, thus allowing deferral or downsizing of capital projects.

The Obama Administration's EPA likewise supports sustainable practices to reduce the potential gap between funding needs and spending. Building on concepts similar to those supported by the Bush Administration and on a request in the President's FY2010 budget, in October 2010 EPA issued a "Clean Water and Drinking Water Infrastructure Sustainability Policy" addressing management and pricing of infrastructure funded through SRFs to encourage conservation and provide adequate long-term funding for future capital needs. EPA will work with water utilities to promote planning processes that reflect not only public health and water quality, but also conservation of natural resources and innovative treatment. Further, EPA will work with states to target SRF assistance to projects that focus on system upgrade and replacement in existing communities, reflect full life cycle costs of infrastructure assets, and conserve natural resources or use alternative approaches.

## **Legislative Responses**

Congress has considered water infrastructure funding issues several times since the 107<sup>th</sup> Congress. In that Congress, House and Senate committees approved bills to extend the act's SRF program and increase federal assistance (H.R. 3930; S. 1961). The Senate bill was reported, but a report on H.R. 3930 was not filed; neither bill received further action.

In the 108<sup>th</sup> Congress, bills to reauthorize the Clean Water Act SRF program were introduced, as were separate bills to reauthorize funding for sewer overflow grants (CWA Section 221). The Senate Environment and Public Works Committee reported legislation authorizing \$41.25 billion over five years for wastewater and drinking water infrastructure programs, including \$20 billion for the clean water SRF program (S. 2550). In addition, the House Transportation and Infrastructure Subcommittee on Water Resources and Environment approved H.R. 1560

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<sup>10</sup> For additional information on many of these topics, see CRS Report RL31116, *Water Infrastructure Needs and Investment: Review and Analysis of Key Issues*, by Claudia Copeland and Mary Tiemann.

(legislation similar to H.R. 3930, the bill approved by that committee in the 107<sup>th</sup> Congress), but no further action occurred.

In the 109<sup>th</sup> Congress, the Senate Environment and Public Works Committee approved S. 1400, the Water Infrastructure Financing Act, in July 2005. The bill was similar to S. 2550 in the 108<sup>th</sup> Congress. No further action occurred on this bill, and there was no legislative activity in the House on similar legislation during the 109<sup>th</sup> Congress.

Throughout this period, several factors contributed to problems in moving any of these bills further in the legislative process, including Administration opposition to higher authorization levels, disputes over the formula for allocating clean water SRF grants among the states, and controversies over application of prevailing wage requirements of the Davis-Bacon Act.

The issue of the applicability of the Davis-Bacon Act to SRF-funded projects has been especially controversial, because that act has both strong supporters and critics in Congress and elsewhere. Davis-Bacon requires, among other things, that not less than the locally prevailing wage be paid to workers employed, under contract, on federal construction work “to which the United States or the District of Columbia is a party.” Critics of Davis-Bacon say that it unnecessarily increases public construction costs and hampers competition, while supporters say that it helps stabilize the local construction industry by preventing competition that would undercut local wages and working conditions. Under the original SRF program authorization enacted in 1987, the Davis-Bacon Act applied to so-called “first use” monies provided by a state from its SRF (that is, loans made from initial federal capitalization grants, but not to subsequent monies provided from repayments to the SRF). When that authorization expired at the end of FY1994, Davis-Bacon requirements also expired. Thus, the recent issue has been whether to restore the applicability of those requirements.<sup>11</sup>

## **110<sup>th</sup> Congress**

In March 2007 the House approved three wastewater infrastructure financing bills; however, the Senate did not act on any of them during the remainder of the 110<sup>th</sup> Congress. H.R. 720, the Water Quality Financing Act of 2007, was substantially similar to legislation that the House Transportation and Infrastructure Committee’s Water Resources and Environment Subcommittee approved in the 108<sup>th</sup> Congress (H.R. 1560). It would have authorized \$14 billion for the clean water SRF program for FY2008-FY2011. It included several provisions intended to benefit economically disadvantaged and small communities, such as allowing extended loan repayments (30 years, rather than 20) and additional subsidies (e.g., principal forgiveness and negative interest loans) for communities that meet a state’s affordability criteria. One key difference between this bill and the earlier legislation was the specification in H.R. 720 that the Davis-Bacon Act prevailing wage requirement shall apply to all projects financed in whole or in part through an SRF.

The House also passed H.R. 569, a bill to reauthorize CWA Section 221 and to provide funding for projects to correct municipal sewer overflows (see discussion of this issue on page 16); and H.R. 700, a bill to reauthorize CWA Section 220 and to extend a pilot program to develop alternative water source projects (i.e., projects to meet critical water supply needs).

The Senate Environment and Public Works Committee held an oversight hearing on wastewater infrastructure needs in September 2007 and later took up a specific legislative proposal dealing with financing issues. In September 2008, the committee approved the Water Infrastructure

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<sup>11</sup> For additional information, see CRS Report R41469, *Davis-Bacon Prevailing Wages and State Revolving Loan Programs Under the Clean Water Act and the Safe Drinking Water Act*, by Gerald Mayer and Jon O. Shimabukuro.

Financing Act (S. 3617), a bill that was similar to a measure that the committee approved in the 109<sup>th</sup> Congress (S. 1400). S. 3617 would have authorized \$19.6 billion for grants to capitalize the Clean Water Act SRF program and \$14.7 billion for Safe Drinking Water Act SRF capitalization grants through FY2012. The bill would have expanded eligibility for clean water SRF assistance including, for example, projects that implement stormwater management, water conservation or efficiency projects, and water and wastewater reuse and recycling projects; and it included a number of provisions to make the clean water and drinking water SRF programs more parallel, such as allowing SRF assistance to be used by private as well as public wastewater treatment systems. The committee approved an amendment adding Davis-Bacon Act language similar to that in House-passed H.R. 720, specifying that prevailing wage requirements shall apply to all projects financed in whole or in part through an SRF.

## **111<sup>th</sup> Congress**

Water infrastructure legislation again received attention in the 111<sup>th</sup> Congress. The House passed a bill, and legislation was reported by a Senate committee. Several issues contributed to the fact that, once again, no legislation was enacted. In particular, there was continuing criticism about the applicability of Davis-Bacon prevailing wage requirements, and criticism also of a new formula for state-by-state allocation of SRF capitalization grants.

### ***H.R. 1262***

On March 12, 2009, the House approved legislation to reauthorize the SRF program and several related programs in the CWA (H.R. 1262). The bill included provisions of five bills that the House passed during the 110<sup>th</sup> Congress, but none were enacted.

Title I of H.R. 1262 would have authorized \$13.8 billion in SRF capitalization grants over five years, FY2010-2014, and was essentially the same text as H.R. 720 as passed by the House in March 2007. It included several provisions intended to benefit economically disadvantaged and small communities, such as allowing extended loan repayments (30 years, rather than 20) and additional subsidies (e.g., principal forgiveness and negative interest loans) for communities that meet a state's affordability criteria. The bill included several provisions intended to encourage and make SRF-eligible projects involving green infrastructure,<sup>12</sup> water reuse and conservation, and energy-efficient technologies. It included provisions to require communities to plan for capital replacement needs and to develop and implement an asset management plan for the repair and maintenance of infrastructure that is being financed. It also included specification that the Davis-Bacon Act prevailing wage requirement shall apply to all projects financed in whole or in part through an SRF. During debate on the bill, the House defeated an amendment that would have deleted the prevailing wage provision from the bill.

Title II incorporated the text of H.R. 700. It would have reauthorized CWA Section 220 to extend a pilot program to develop alternative water source projects at \$50 million per year through FY2014. The House passed a similar bill (also H.R. 700) in March 2007.

Title III incorporated the text of H.R. 895. It would have reauthorized CWA Section 221 to authorize a total of \$2.5 billion through FY2014 for projects to correct municipal sewer

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<sup>12</sup> Green infrastructure, broadly defined, is an approach to water management that reduces stormwater runoff, sewer overflows, and flooding by protecting, restoring, or mimicking the natural hydrology of an area. It is often accomplished through the use of plants and soils or engineered solutions that recreate natural processes, such as planting trees and restoring wetlands.

overflows. Twenty percent of these monies were to be used for green infrastructure projects. The House passed a similar bill (H.R. 569) in March 2007.

Title IV incorporated the text of H.R. 753. It was intended to ensure that sewage treatment plants monitor for and report discharges of raw sewage due to overflows from sanitary sewers. The bill would have required EPA to issue criteria to guide plant operators in assessing whether a sewer overflow has the potential to affect human health or imminently and substantially endanger human health. The Senate Environment and Public Works Committee approved a bill similar to this title of H.R. 1262 on June 18 (S. 937). The House also passed a similar bill in June 2008 (H.R. 2452).

Title V would have reauthorized the CWA's program for cleanup of contaminated sediments in the Great Lakes with \$150 million per year in funding through FY2014. In the 110<sup>th</sup> Congress, the House had passed H.R. 6460, providing this level of funding and making certain programmatic changes, but as enacted (P.L. 110-365), the bill retained the existing funding level of \$50 million per year. Title V would have increased authorized funding to the level supported by the House in the 110<sup>th</sup> Congress. The Senate Environment and Public Works Committee approved a bill similar to this title of H.R. 1262 on June 18 (S. 933).

During consideration of H.R. 1262, the House adopted several amendments, including (1) a requirement that states use at least 15% of SRF capitalization grants to assist small communities; (2) establishment of a federal task force on proper disposal of unused pharmaceuticals (based on H.R. 276); (3) a requirement that the Office of Management and Budget establish a crosscut budget for Chesapeake Bay (based on H.R. 1053); and (4) requirements for studies of infrastructure along the Rio Grande River and along the U.S.-Mexico border, wastewater infrastructure in the United States and Canada that discharge into the Great Lakes, and the presence of pharmaceuticals and personal care product chemicals in U.S. waters.

### ***S. 1005***

Companion legislation was approved by the Senate Environment and Public Works Committee in May 2009 (S. 1005, the Water Infrastructure Financing Act), but the Senate did not consider the bill. The legislation was modeled after a bill approved by the same committee in the 110<sup>th</sup> Congress (S. 3617). The 111<sup>th</sup> Congress bill would have authorized \$20 billion over five years for clean water SRF grants and \$14.7 billion over five years for drinking water SRF grants. It also would have added a \$1.85 billion nationwide grant program for addressing combined sewer overflows (reauthorizing existing CWA Section 221) and a \$50 million grant program for agriculture-related water quality issues.

Like the 110<sup>th</sup> Congress bill, S. 1005 would have expanded eligibility for clean water SRF assistance including, for example, to projects that implement stormwater management, water conservation or efficiency projects, and water and wastewater reuse and recycling projects; and it included a number of provisions to make the clean water and drinking water SRF programs more parallel. Unlike House-passed H.R. 1262, the Senate bill did not include a requirement for states to set aside or reserve a portion of their SRF capitalization grants for "green" infrastructure projects, such as projects that include water or energy efficiency measures. However, it included incentives for "green" infrastructure, such as allowing states to forgive a portion of an SRF loan used for "green" projects. During markup, the Committee adopted several amendments, including one to specify that the Davis-Bacon Act prevailing wage requirement shall apply to all projects financed in whole or in part through a clean water or drinking water SRF (Davis-Bacon language was not included in the bill as introduced), one to require a study by the National Academy of Sciences on the presence of pharmaceuticals and personal care products in U.S. waters, and

another to direct EPA to gather information necessary to update an existing guidance document that addresses affordability of CSO remediation projects.

### SRF Allocation Formula

An important issue to many stakeholders is the formula that determines how clean water SRF capitalization grants are distributed among the states. CWA Section 205(c)(3) contains a table that identifies each state's percentage share of appropriated funds. That statutory allotment has not been revised since 1987.<sup>13</sup> Both H.R. 1262 and S. 1005 would have revised the current allotment, but in different ways. The House bill would have extended the current formula in full for two years. Beginning in the third year (FY2012 and thereafter), distribution would be determined under a hybrid approach: for appropriated funds up to \$1.35 billion, the current formula would apply, and for appropriated funds in excess of that amount, allotment would be done in accordance with funding needs as reported in the most recent clean water needs survey conducted by EPA and states.

The Senate bill included a table with a new state-by-state allotment for clean water SRF capitalization grants.<sup>14</sup> The revised formula, which was to take effect in FY2010 and apply through FY2014, included certain adjustments—for example, guaranteeing small states a minimum 0.75% share (rather than 0.5% as under current law), and generally insuring that no state would “gain” more than 50% compared with its current percentage share or “lose” more than 25% compared with its current allotment. For details of the S. 1005 formula and comparison with the current statutory allocation, see **Table A-1** in this report. The allocation formula was one of the factors that contributed to the fact that the Senate did not consider S. 1005. The formula proposed in the legislation was based on needs identified in the 2004 clean water needs survey. However, after the Senate committee reported the bill, EPA released the 2008 needs survey, leading some members to favor developing a different formula based on the newer needs estimates. Ultimately, bill sponsors were unable to revise the allocation formula in the legislation to meet these concerns.

### Water Infrastructure Trust Fund

For some time, interest has been growing in identifying and developing new mechanisms to help localities pay for water infrastructure projects, beyond direct federal grants or SRFs, which appear insufficient to fully meet funding needs. In June 2005, the House Transportation and Infrastructure Subcommittee on Water Resources and Environment held hearings on alternative means to fund water infrastructure projects in the future. At the first hearing, witnesses focused on one way to increase funding for water infrastructure that has been advocated by some groups, creating a national clean water trust fund that would conceptually be similar to trust funds that exist for highway and aviation projects. Witnesses and subcommittee members discussed difficulties in identifying potential revenue sources that would be deemed fair and equitable. The second hearing addressed other financing options, such as expanded use of tax-exempt private activity bonds, and more efficient management techniques, such as asset management programs and sustainable infrastructure initiatives. In the 109<sup>th</sup> Congress, legislation was introduced to establish a \$7.5 billion federal trust fund for wastewater infrastructure improvements. That bill,

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<sup>13</sup> For additional information on the current statutory formula, see CRS Report RL31073, *Allocation of Wastewater Treatment Assistance: Formula and Other Changes*, by Claudia Copeland.

<sup>14</sup> No change was proposed for the method of allocating capitalization grants under the Safe Drinking Water Act's companion SRF program. S. 1005 would have retained the current approach, which calls for EPA to establish the state-by-state allocation—not Congress—based on the most recent drinking water needs survey.



H.R. 4560, proposed to use a concept for funding such projects that has been promoted by wastewater treatment industry officials, other stakeholders, and some environmentalists, who argue it could provide a new source of money for necessary system upgrades amid dwindling federal funds. The bill contemplated a system of user fees to create the fund, but the source of revenue was not specified in the bill.

Although the 109<sup>th</sup> Congress did not act on H.R. 4560, the issue of a water infrastructure trust fund received some attention in the 111<sup>th</sup> Congress. Legislation to create a Water Protection and Reinvestment Trust Fund was introduced (H.R. 3202). Proponents estimated that at least \$10 billion per year could be raised through a combination of excise taxes on water-based beverages, pharmaceutical products, and items disposed on in wastewater (such as cosmetics and toilet paper), plus a corporate profits tax. These revenues would be available to fund clean water and drinking water SRF programs, as well as security upgrades, wastewater and drinking water technology research, grants to water utilities for climate change adaptation, and other programs. The House Transportation and Infrastructure Subcommittee on Water Resources held a hearing on July 15, 2009, receiving testimony from a number of witnesses on the legislation and related issues. A GAO witness discussed findings in a GAO report which concluded that a combination of taxes on industry, corporation and water could provide a dedicated source of revenue, but that finding consensus on the issue could be challenging.<sup>15</sup> No further legislative action occurred.

## **Regulatory Protection of Wetlands**

How best to protect the nation's remaining wetlands and regulate activities taking place in wetlands has become one of the most contentious environmental policy issues, especially in the context of the CWA, which contains a key wetlands regulatory tool, the permit program in Section 404. It requires landowners or developers to obtain permits for disposal of dredged or fill material that is generated by construction or similar activity into navigable waters of the United States, including wetlands. Section 404 has evolved through judicial interpretation and regulatory change to become one of the principal federal tools used to protect wetlands, although that term appears only once in Section 404 itself and is not defined there. At the same time, its implementation has come to be seen as intrusive and burdensome to those whose activities it regulates. At issue today is how to address criticism of the Section 404 regulatory program while achieving desired goals of wetlands protection.<sup>16</sup>

Unlike the rest of the act, the permit aspects of Section 404 are administered by the U.S. Army Corps of Engineers, rather than EPA, although the Corps uses EPA environmental guidance. Other federal agencies including the U.S. Fish and Wildlife Service (FWS) and Natural Resource Conservation Service (NRCS) have more limited roles in the Corps' permitting decisions. Tension has existed for many years between the regulation of activities in wetlands under Section 404 and related laws, on the one hand, and the desire of landowners to develop property that may include wetlands, on the other hand. The conflicts over wetlands regulation have for the most part occurred in judicial and administrative proceedings, as Congress has not amended Section 404 since 1977, when it provided exemptions for categories of routine activities, such as normal farming and forestry. Controversy has grown over the extent of federal jurisdiction and impacts on private property, burdens and delay of permit procedures, and roles of federal agencies and states in issuing permits.

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<sup>15</sup> U.S. Government Accountability Office, *Clean Water Infrastructure, A Variety of Issues Need to Be Considered When Designing a Clean Water Trust Fund*, GAO-09-657, May 2009.

<sup>16</sup> For additional information, see CRS Report RL33483, *Wetlands: An Overview of Issues*, by Claudia Copeland.

## Judicial Proceedings Involving Section 404

One issue involving long-standing controversy and litigation is whether isolated waters are properly within the jurisdiction of Section 404. Isolated waters—wetlands which are not physically adjacent to navigable surface waters—often appear to provide only some of the values for which wetlands are protected, such as flood control or water purification, even if they meet the technical definition of a wetland.

### SWANCC

On January 9, 2001, the Supreme Court ruled on the question of whether the CWA provides the Corps and EPA with authority over isolated waters. The Court's 5-4 ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* (531 U.S. 159 (2001)) held that the Corps' denial of a 404 permit for a disposal site on isolated wetlands solely on the basis that migratory birds use the site exceeds the authority provided in the act.

The full extent of impacts on the regulatory program resulting from this decision remains unclear, even 10 years after the ruling, in part because of different interpretations of *SWANCC* reflected in subsequent federal court cases. While it continues to be difficult to fully assess how regulatory protection of wetlands will be affected as a result of the *SWANCC* decision and other possible changes, the remaining responsibility to protect affected wetlands falls on states and localities.<sup>17</sup> Environmentalists believe that the Court misinterpreted congressional intent on the matter, while industry and landowner groups welcomed the ruling. Policy implications of how much the decision restricts federal regulation depend on how broadly or narrowly the opinion is applied. Some federal courts have interpreted *SWANCC* narrowly, thus limiting its effect on current permit rules, while a few read the decision more broadly.

The government's view on this key question came in EPA-Corps guidance issued in January 2003. It provides a legal interpretation essentially based on a narrow reading of the Court's decision, thus allowing federal regulation of some isolated waters to continue, but it calls for more headquarters review in disputed cases. Interest groups on all sides have been critical of confusion in implementing the 2003 guidance, which constitutes the main tool for interpreting the reach of the *SWANCC* decision. Environmentalists remain concerned about diminished protection resulting from the guidance, while developers said that without new regulations, confusing and contradictory interpretations of wetland rules will continue.

### *Rapanos v. United States*

Federal courts continue to have a key role in interpreting and clarifying the *SWANCC* decision. On February 21, 2006, the Supreme Court heard arguments in two cases brought by landowners (*Rapanos v. United States*; *Carabell v. U.S. Army Corps of Engineers*) seeking to narrow the scope of the CWA permit program as it applies to development involving wetlands. The issue in both cases had to do with the reach of the CWA to cover "waters" that were not navigable waters, in the traditional sense, but were connected somehow to navigable waters or "adjacent" to those waters. (The act requires a federal permit to discharge dredged or fill materials into "navigable waters.") Many legal and other observers hoped that the Court's ruling in these cases would bring greater clarity about the scope of federal jurisdiction.

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<sup>17</sup> For additional information, see CRS Report RL30849, *The Supreme Court Addresses Corps of Engineers Jurisdiction Over "Isolated Waters": The SWANCC Decision*, by Robert Meltz.

The Court's ruling was issued on June 19, 2006 (*Rapanos, v. United States*, 547 U.S. 715 (2006)). In a 5-4 decision, a plurality of the Court, led by Justice Scalia, held that the lower court had applied an incorrect standard to determine whether the wetlands at issue are covered by the CWA. Justice Kennedy joined this plurality to vacate the lower court decisions and remand the cases for further consideration, but he took different positions on most of the substantive issues raised by the cases, as did four other dissenting justices.<sup>18</sup> Because the several opinions written by the justices did not draw a clear line regarding which wetlands and other waters are subject to federal jurisdiction, one result has been more case-by-case determinations and continuing litigation. There also has been pressure on the Corps and EPA to clarify the issues through an administrative rulemaking.

On June 5, 2007—nearly one year after the *Rapanos* ruling—EPA and the Corps issued guidance to enable their field staffs to make CWA jurisdictional determinations in light of the decision. According to the guidance, the agencies will assert regulatory jurisdiction over certain waters, such as traditional navigable waters and adjacent wetlands. Jurisdiction over others, such as non-navigable tributaries that do not typically flow year-round and wetlands adjacent to such tributaries, will be determined on a case-by-case basis, to determine if the waters in question have a significant nexus with a traditional navigable water.

The guidance took effect immediately, but the agencies also solicited public comments, and left open the possibility of further changes in the future. Based on more than 66,000 public comments received and 18 months of implementation of the 2007 guidance, EPA and the Corps issued revised guidance December 2, 2008.<sup>19</sup> The revisions made few changes to the earlier document, but did add clarification of some key terms that are important to determining CWA jurisdiction, such as the meaning of the regulatory term “adjacent wetlands.” The agencies continue to take the position that, based on additional experience, they could provide supplementary guidance or initiate rulemaking. Some environmental groups criticized the revised guidance, saying that it continues to substantially limit the scope of waters that are protected by the CWA. Industry analysts said that the few changes in the guidance could make it simpler for regulators to make jurisdictional determinations, but overall, industry groups such as developers are frustrated by what they see as inconsistencies and delays in obtaining needed permits.

## Congressional Responses

Congressional committees have held a number of oversight hearings on both the *SWANCC* and *Rapanos* decisions, seeking clarification of interpretations and impacts of the rulings. But the uncertainties about federal jurisdiction over wetlands and other waters raised by the rulings remain highly controversial. In response, legislation to overturn the decisions by providing a broad definition of “waters of the United States” has been introduced regularly since the 107<sup>th</sup> Congress. Other legislation to narrow the definition of “waters of the United States” also was introduced on one occasion, in the 109<sup>th</sup> Congress.

Environmental advocates and others contend that Congress must clarify the important issues left unsettled by the Supreme Court's 2001 and 2006 rulings and by the Corps/EPA guidance. They also argue that legislation is needed to “reaffirm” what Congress intended when the CWA was enacted in 1972 and what EPA and the Corps have subsequently been practicing until the two Supreme Court rulings, in terms of broad CWA jurisdiction. In the 110<sup>th</sup> Congress, two such bills

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<sup>18</sup> For additional information, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA) Is Revisited by the Supreme Court: Rapanos v. United States*, by Robert Meltz and Claudia Copeland.

<sup>19</sup> The 2008 revised guidance and related documents, including the 2007 guidance that it supersedes, are available at <http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html>.

were H.R. 2421 and S. 1870. The House Transportation and Infrastructure Committee held hearings on H.R. 2421 and related jurisdictional issues in July 2007 and April 2008. The Senate Environment and Public Works Committee held a hearing on issues related to the *Rapanos* ruling in December 2007 and held a legislative hearing on S. 1870 the following April. But critics continue to question the constitutionality of the legislation and assert that it would expand federal authority, thus likely increasing confusion, rather than settling it.

Obama Administration officials have addressed concerns about the continuing uncertainties regarding the proper scope of CWA regulatory jurisdiction. In May 2009, the heads of EPA, the Corps, the Department of Agriculture, the Department of the Interior, and the Council on Environmental Quality jointly wrote to congressional leaders to support the need for legislative clarification of the issues—marking the first time that the Administration has done so—and to identify certain principles that might help guide legislative and other actions: Broadly protect the nation’s waters; make the definition of covered waters predictable and manageable; promote consistency between CWA and agricultural wetlands programs; and recognize long-standing practices, such as exemptions now in effect only through regulations or guidance.<sup>20</sup>

In the 111<sup>th</sup> Congress, legislation similar to bills introduced previously was advanced by a Senate committee, but the bill was not considered by the full Senate. On June 18, 2009, the Environment and Public Works Committee approved, 12-7, an amended version of S. 787, the Clean Water Restoration Act. A written report on S. 787 (S.Rept. 111-361) was filed more than 18 months later, days before the 111<sup>th</sup> Congress adjourned *sine die*. The bill would have amended the CWA to define “waters of the United States” to mean:

all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any of the above waters, and all impoundments of the foregoing.

The bill would have excluded prior converted cropland and certain waste treatment systems from the term “waters of the United States,” and it would have protected, or saved, existing regulatory exclusions such as for dredge or fill discharges from normal farming activities. The bill also would have instructed that “waters of the United States” be construed consistently with (1) how EPA and the Corps interpreted and applied “waters of the United States prior to January 9, 2001, the day before *SWANCC* was decided, and (2) Congress’s constitutional authority. During markup, the committee rejected several amendments that would have struck some of the terms in the new definition (such as mudflats and prairie potholes), but it approved language stating that the CWA’s jurisdiction shall be construed consistent with EPA and Corps interpretation prior to Jan. 9, 2001. However, critics asserted that that intent was what the Court found invalid in its rulings in the *SWANCC* and *Rapanos* cases.

Companion legislation was introduced in the House on April 23, 2010 (H.R. 5088, America’s Commitment to Clean Water Act).<sup>21</sup> Like S. 787, the House bill was intended to clarify regulatory scope of the CWA and restore jurisdiction as it had been interpreted prior to the *SWANCC* and *Rapanos* rulings. Like the Senate committee bill, H.R. 5088 would have deleted the word “navigable” from the law, which has become a source of interpretive controversy, and would have amended the CWA to define “waters of the United States,” which would become the operational

<sup>20</sup> See [http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord\\_id=64739ae3-802a-23ad-4c30-36fc58cc1014&Region\\_id=&Issue\\_id=](http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=64739ae3-802a-23ad-4c30-36fc58cc1014&Region_id=&Issue_id=).

<sup>21</sup> For information on the 111<sup>th</sup> Congress legislation, see CRS Report R41225, *Legislative Approaches to Defining “Waters of the United States,”* by Claudia Copeland.

term for jurisdiction. Unlike the Senate committee bill described above, the new definition of that term was to be drawn from existing EPA-Corps regulatory definitions, with some modifications. The principal House sponsor, Representative Oberstar, stated that the bill differed from prior proposals (such as H.R. 2421 in the 110<sup>th</sup> Congress), based on extensive public comments and suggestions. Despite changes from earlier versions, the bill was criticized based on concern that it would increase the scope of federal jurisdiction, not merely re-state what Congress enacted in 1972.

## **Other Clean Water Act Issues**

Several other issues affecting efforts to achieve the goals and objectives of the Clean Water Act drew interest during the 111<sup>th</sup> Congress through oversight and legislation. Two bills were enacted—a bill concerning pollutant discharges from vessels, and another dealing with federal agencies' responsibility to pay for stormwater charges.

### **Implementation of the BEACH Act**

In 2000 Congress enacted the Beaches Environmental Assessment and Coastal Health Act (the BEACH Act) in order to augment federal and state efforts to prevent human exposure to polluted coastal recreation waters, including the Great Lakes. This act directed coastal states to adopt updated water quality standards and EPA to develop new protective criteria and standards. It also authorized grants to coastal states to support monitoring and notification programs. In May 2007 the GAO issued a report on federal and state implementation, finding that EPA has implemented most provisions of the act, but has not yet published new or revised water quality criteria, which the law required by 2005.<sup>22</sup>

In the 110<sup>th</sup> Congress, Senate and House committees held hearings on the status of implementation of the BEACH Act, and bills to extend authorization for appropriations for the act's grants were introduced. The House approved one such bill (H.R. 2537). It would have allowed states to use BEACH Act funds to track sources of pollution and would require states to use rapid testing methods of beach water, in order to improve public notification. It proposed to increase grant funds to the states from \$30 million annually to \$40 million. It also would have directed EPA to publish revised water quality criteria for pathogens, a key pollutant of concern at beaches, as well as a list of all pathogens and pathogen indicators it has studied and observed in the course of developing those criteria. The Senate Environment and Public Works Committee approved companion legislation (S. 2844), but no further action occurred.

The 111<sup>th</sup> Congress considered similar bills. House and Senate committees approved legislation (H.R. 2093 and a similar bill, S. 878) that would have required more rapid testing of beach waters for contamination and faster notification to the public to warn of contamination. Both bills also would have increased grants funds to the states for beach monitoring and testing. The House passed H.R. 2093 on July 29, 2010.

### **Combined and Separate Sewer Overflows**

About 750 U.S. communities have combined sewers where domestic sanitary sewage, industrial wastes, infiltration from groundwater, and stormwater runoff are collected. These systems serve

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<sup>22</sup> U.S. Government Accountability Office, *EPA and States Have Made Progress in Implementing the BEACH Act, but Additional Actions Could Improve Public Health Protection*, GAO-07-591, May 2007.



approximately 40 million persons, mainly in older urban and coastal cities. Normally (under dry-weather conditions), the combined wastes are conveyed to a municipal sewage treatment plant.

Properly designed, sized, and maintained combined sewers can be an acceptable part of a city's water pollution control infrastructure. However, combined sewer overflow (CSO) occurs when the capacity of the collection and treatment system is exceeded due to high volumes of rainwater or snowmelt, and the excess volume is diverted and discharged directly into receiving waters, bypassing the sewage treatment plants. Often the excess flow that contains raw sewage, industrial wastes, and stormwater is discharged untreated. Many combined sewer systems are found in coastal areas where recreational areas, fish habitat and shellfish beds may be contaminated by the discharges. To manage CSOs, cities are subject to a policy issued by EPA in 1994 that requires implementation of nine minimum controls that generally are based on combinations of management techniques (such as temporary retention of excess flow during storm events) and structural measures (such as construction of separate storm sewer systems).

One issue that concerns some cities is the problem of overflows from municipal separate sanitary sewers (SSOs) that are not CSOs because they transport only sanitary wastes. Discharges of untreated sewage from these sewers can occur from manholes, broken pipes and deteriorated infrastructure, and undersized pipes, and can occur in wet or dry weather. EPA estimates that there are about 18,000 municipalities with separate sanitary sewers, all of which can, under certain circumstances, experience overflows. No explicit EPA or statutory control policy for addressing SSOs currently exists.

Funding for CSO and SSO projects is a major concern of states and cities. The most recent clean water needs survey found that the largest needs category, totaling \$55 billion and representing 27% of total water infrastructure needs, is to address CSOs. In 2000, Congress passed legislation, the Wet Weather Water Quality Act, authorizing a two-year \$1.5 billion grants program to reduce wet weather flows from municipal sewer systems, both CSOs and SSOs (Section 112 of Division B, P.L. 106-154). However, Congress provided no appropriations for these wet weather grants during the two years of authorization (FY2002-FY2003). As described above, in March 2007, the House passed legislation to reauthorize this grant program (H.R. 569), and in the 111<sup>th</sup> Congress, similar language was included in Title III of H.R. 1262, as passed by the House in March 2009, and also in S. 1005, as reported to the Senate in June 2009.

On a related issue, Title IV of H.R. 1262 also included the text of H.R. 753 in the 111<sup>th</sup> Congress (and was identical to House-passed H.R. 2452 from the 110<sup>th</sup> Congress), which would have required EPA to issue criteria to guide wastewater treatment plant operators in assessing whether a sewer overflow has the potential to affect human health or imminently and substantially endanger human health. Similar legislation was approved by the Senate Environment and Public Works Committee (S. 937).

## **Chesapeake Bay Restoration**

Despite several decades' of activity by government, the private sector, and the general public, efforts to restore and protect the Chesapeake Bay watershed have been insufficient to meet restoration goals. The Bay and its tributaries remain in poor health, with polluted water, reduced populations of fish and shellfish, and degraded habitat and resources. The primary pollutants causing impairments are nutrients (nitrogen and phosphorus) and sediment, which are discharged from multiple urban, suburban, and rural sources around the Bay.

In May 2009, President Obama issued an executive order that declared the Bay a "national treasure" and charged the federal government with assuming a strong leadership role in restoring



the Bay.<sup>23</sup> The executive order established a Federal Leadership Committee for the Chesapeake Bay to develop and implement a new strategy for protecting and restoring the Chesapeake region. The resulting strategy, which was released on May 12, 2010, launches major specific environmental initiatives to establish new clean water regulations on stormwater discharges and pollution discharges from animal feedlots in the Bay watershed, put new agricultural conservation practices on farms in the region, and restore land and water habitat.<sup>24</sup>

A central feature of the overall strategy is EPA's pledge to establish a Total Maximum Daily Load (TMDL) for Chesapeake Bay. Section 303 of the CWA requires states to identify waters that are impaired by pollution, even after application of pollution controls. For those waters, states must establish a TMDL to ensure that water quality standards can be attained. A TMDL is essentially a pollution budget, a quantitative estimate of what it takes to achieve standards, setting the maximum amount of pollution that a waterbody can receive without violating standards. If a state fails to do this, EPA is required to make its own TMDL determination for the state. Throughout the United States—including the Chesapeake Bay watershed—more than 20,000 waterways are known to be violating applicable water quality standards and to require a TMDL.<sup>25</sup> Lawsuits have been brought with the intention of pressuring EPA and states to develop TMDLs; under a consent decree in one such lawsuit, EPA must establish a Chesapeake Bay TMDL no later than May 1, 2011. The Chesapeake Bay TMDL will be the largest single TMDL developed to date. It will address all segments of the Bay and its tidal tributaries that are impaired from discharges of nitrogen, phosphorus, and sediment, and the TMDL will allocate needed reductions of these pollutants to all jurisdictions in the 64,000 square mile watershed. Detailed plans identifying specific reductions will be developed by the Bay states in Watershed Implementation Plans.

EPA's TMDL plans and the overall federal Bay restoration strategy under the executive order are controversial with a number of groups that are concerned about the likely mandatory nature of many of EPA's and states' upcoming actions. On the other hand, environmental activists are pleased that the federal government is now asserting a leadership role to restore the Bay and are supporting legislation that would codify requirements for the Bay TMDL in the Clean Water Act, while authorizing grants and other assistance for implementing required measures. Bills to do so were introduced in the 111<sup>th</sup> Congress (S. 1816 and H.R. 3852), and House and Senate committee hearings were held. In June 2010, the Senate Environment and Public Works Committee approved an amended version of S. 1816. As reported, the bill generally sought to codify 2025 as a date-certain for implementing restoration actions throughout the Chesapeake Basin and would have made explicit backup authority for EPA to develop measures to restore the watershed, if states fail to do so. The legislation would have authorized significant financial resources, totaling \$2.26 billion over five years, to assist in implementing programs, projects, and measures for restoration of the Chesapeake Basin watershed.<sup>26</sup>

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<sup>23</sup> Executive Order 13508, "Chesapeake Bay Protection and Restoration," 74 *Federal Register* 23099-23104, May 15, 2009.

<sup>24</sup> For information, see [http://www.chesapeakebay.net/news\\_federalstrategy.aspx?menuitem=51207](http://www.chesapeakebay.net/news_federalstrategy.aspx?menuitem=51207).

<sup>25</sup> For background information, see CRS Report 97-831, *Clean Water Act and Total Maximum Daily Loads (TMDLs) of Pollutants*, by Claudia Copeland.

<sup>26</sup> Also in June 2010, the Senate Environment Committee ordered reported amended versions of several other CWA bills with a geographic-specific focus: S. 1311, concerning the Gulf of Mexico; S. 2739, Puget Sound; S. 3073, Great Lakes cleanup; S. 3119, Long Island Sound; S. 3539, San Francisco Bay, and H.R. 4715, concerning the National Estuary Program. The Committee also approved legislation to restore the Columbia River Basin S. 4016. In the final days of the 111<sup>th</sup> Congress, these and several other water quality bills were compiled in a comprehensive measure, the America's Great Outdoors Act of 2010 (S.Amdt. 4845). However, the 111<sup>th</sup> Congress adjourned on December 22, 2010, and, thus, ran out of time to take up either the omnibus bill or individual measures that were included in it. For

## National Estuary Program Reauthorization

The 1987 CWA amendments established the National Estuary Program (NEP), a program to promote comprehensive planning efforts to protect nationally significant estuaries that are threatened by pollution, development, and overuse. Governors may nominate an estuary for inclusion in the program. Once approved by EPA, the estuary can receive financial and technical assistance from EPA to develop and implement a comprehensive management plan that addresses factors that contribute to the estuary's degradation. The planning process is intended to be stakeholder-driven and collaborative, and non-federal matching funds are required. To date, EPA has approved 28 estuaries as part of the program. Since 1987, Congress has amended the NEP provision to reauthorize funding and in several cases to identify estuaries to be given priority consideration under the program. Current authorization of appropriations expired in FY2010. In April 2010, the House passed legislation (H.R. 4715, the Clean Estuaries Act) to reauthorize assistance through FY2016 and to increase the authorization in order to encourage EPA to expand the number of estuaries included in the program. Further, H.R. 4715 would have added several requirements in the development of a comprehensive management plan, such as addressing the impacts of climate change, and would have required periodic update of the plan and evaluation and approval by EPA. Under the bill, if the EPA review were to find the plan deficient, EPA could reduce grant funding until the plan was revised. On June 30, 2010, the Senate Environment and Public Works Committee approved an amended version of H.R. 4715.

## Mountaintop Mining

Mountaintop removal coal mining involves removing the top of a mountain in order to recover the coal seams contained there. This practice occurs in six Appalachian states (Kentucky, West Virginia, Virginia, Tennessee, Pennsylvania, and Ohio). It creates an immense quantity of excess spoil, which is typically placed in valley fills on the sides of the former mountains, burying streams that flow through the valleys. Critics say that, as a result of valley fills, stream water quality and the aquatic and wildlife habitat that streams support are destroyed. The mining industry argues that mountaintop mining is essential to conducting surface coal mining in the Appalachian region and that surface coal mining would not be economically feasible there if producers were restricted from using valleys for the disposal of mining overburden.

Mountaintop mining is regulated under several laws, including the CWA Section 404 permit program (discussed above) and the Surface Mining Control and Reclamation Act. In June 2009, officials of EPA, the Corps of Engineers, and the Department of the Interior signed a Memorandum of Understanding outlining a series of administrative actions under these laws to reduce the harmful environmental impacts of mountaintop mining and surface coal mining in Appalachia. The plan includes a series of near-term and longer-term actions that emphasize specific steps, improved coordination, and greater transparency of decisions. The actions are being implemented through regulatory proposals, guidance documents, and review of pending applications for permits to authorize mountaintop mining-valley fill operations.

In the 111<sup>th</sup> Congress (as in several prior Congresses), legislation intended to sharply restrict the practice of mountaintop mining was introduced (H.R. 1310, the Clean Water Protection Act, and a different measure, S. 696, the Appalachia Restoration Act). Both bills would have narrowed the CWA definition of "fill material," and thus narrowed the types of materials that can be discharged into U.S. waters under a Section 404 permit. The significance of both bills is that discharges of

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information, see CRS Report R41517, *Water Quality Bills in the Lame Duck Session of the 111<sup>th</sup> Congress*, by Claudia Copeland.

materials that are not eligible for a Section 404 permit are regulated under CWA Section 402. Because Section 402 discharge requirements are more restrictive than those for Section 404, some discharges that could be permitted under Section 404 cannot be authorized under Section 402. Supporters of the bills favored making it more difficult to use Section 404 to authorize activities that they consider to be environmentally harmful. On the other hand, critics said that, as a practical matter, economically important activities such as coal mining could not meet the more stringent limitations of a Section 402 permit and, thus, would be infeasible.

Additionally, legislation intended as criticism of the Administration's recent regulatory actions also was introduced in the 111<sup>th</sup> Congress (H.R. 6113 and S. 3993, the Electricity Reliability Protection Act of 2010). This bill would have prohibited EPA, the Army Corps, and OSM from administering or enforcing any policy or procedure that was announced in the June 2009 MOU or the April 2010 EPA permitting guidance unless they are contained in promulgated regulations. Critics of the Administration's actions have argued that the policies constitute rules, and thus should be subject to complete administrative requirements of rulemaking, including public notice and comment and subsequent judicial review.<sup>27</sup>

## Pollutant Discharges from Vessels

The impacts of court rulings in several cases concerning implementation of existing provisions of the law and involving questions of whether certain activities require a Clean Water Act discharge permit have been of interest for some time. A fundamental element of the act is the requirement that the "discharge of a pollutant" from a point source shall be carried out pursuant to a permit authorized by the National Pollutant Discharge Elimination System (NPDES) program under Section 402 of the law.

Discharges incidental to the normal operation of vessels were not subject to regulation under the Clean Water Act until a 2006 federal court decision reversed EPA policy on the issue. In response, EPA began the process of developing general permits for vessel discharges. However, legislation enacted in July 2008, the Clean Boating Act (P.L. 110-299), provided a two-year moratorium on imposing permit requirements on commercial fishing boats of all size and other commercial vessels less than 79 feet long. The legislation did not relieve larger vessels from permitting requirements, and in December 2008 EPA issued a general permit that applies to approximately 69,000 vessels.<sup>28</sup> Obama Administration officials said that they are considering changes to the vessel general permit, which environmental groups and some states criticized as being weak.

During the moratorium provided by P.L. 110-299, EPA and the Coast Guard were directed to evaluate the impacts of discharges from the vessels that were exempted by the legislation. A draft report was released in March 2010,<sup>29</sup> but because the report would not be final by the time that the moratorium expires, in July Congress approved legislation to extend the current moratorium until December 18, 2013. President Obama signed the extension on July 30, 2010 (P.L. 111-215).

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<sup>27</sup> For additional information, see CRS Report RS21421, *Mountaintop Mining: Background on Current Controversies*, by Claudia Copeland.

<sup>28</sup> For background information, see CRS Report RS22878, *Clean Water Act: 110<sup>th</sup> Congress Legislation on Discharges from Recreational Boats*, by Claudia Copeland. Separate legislation, P.L. 110-288, provides a permanent permitting exemption for recreational vessels.

<sup>29</sup> U.S. Environmental Protection Agency, Office of Water, Report to Congress: Study of Discharges Incidental to Normal Operation of Commercial Fishing Vessels and Other Non-Recreational Vessels Less than 79 Feet, Proposed Draft, March 2010, <http://cfpub.epa.gov/npdes/vessels/reportcongress.cfm>.

## Federal Responsibility to Pay for Stormwater Charges

CWA Section 313 provides that federal agencies and departments shall comply with all federal, state, local requirements to control water pollution from their facilities or property, in the same manner as nongovernmental entities. In December, Congress passed a bill to clarify that Section 313's requirements specifically include federal responsibility to pay reasonable service charges or fees associated with managing stormwater pollution that comes from federal properties (P.L. 111-378). Supporters of the legislation, which included several state, county, and local government organizations, said that the bill addressed an issue of equity, that is, that the federal government bears a proportional responsibility for addressing pollution originating from its facilities and should participate actively in improving the nation's water quality.

## The Relationship Between CWA and FIFRA

In recent years, federal courts have held that aerial application of a pesticide over and into U.S. waters requires a CWA permit, even when the pesticide use meets other requirements of federal law, including the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). These decisions drew the attention of many pesticide applicators, including public health entities such as mosquito control districts, concerned with how the rulings might affect their need to control pests associated with diseases such as the West Nile virus. In November 2006, EPA finalized a rule seeking to resolve the conflict over the regulatory scope of the CWA and FIFRA related to pesticide use, in light of the recent litigation, by promulgating clarifying circumstances under which a CWA permit is or is not required for activities carried out pursuant to FIFRA. But in January 2009, a federal court rejected EPA's argument that residual and excess pesticides from aerial applications that impact U.S. waters do not require an NPDES permit because they are adequately regulated by FIFRA, and the court vacated the rule.<sup>30</sup> In the 109<sup>th</sup> Congress, prior to issuance of the now-vacated rule, legislation intended to affirm that a CWA permit is not required for use of FIFRA-approved pesticides was introduced, but it was not enacted. In June 2009, the federal court granted an EPA request for a two-year delay in the effective date of the court's ruling. During this time, EPA plans to work with states and other affected parties to develop general CWA permits for pesticide applications covered by the ruling.<sup>31</sup> EPA proposed the general permit in June and still expects to finalize the permit by April 9, 2011, as required by the court.<sup>32</sup> Industry groups requested a Supreme Court review of the case, but in February 2010, the Court declined the request. Legislation intended to nullify the 2009 federal court ruling was introduced in the 111<sup>th</sup> Congress (H.R. 6087/S. 3735 and S. 6273), but there was no further action on any of the bills.

## EPA's Water Transfer Rule

Clean Water Act permitting issues also were raised in other litigation. In 2004, the Supreme Court held that the transfer of polluted water from one waterbody to another may require a permit, notwithstanding that no new pollutant is added in the process of transfer.<sup>33</sup> The decision raised

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<sup>30</sup> National Cotton Council of America v. U.S. Environmental Protection Agency, 553 F.3d 927 (6<sup>th</sup> Cir. 2009).

<sup>31</sup> For additional information, see CRS Report RL32884, *Pesticide Use and Water Quality: Are the Laws Complementary or in Conflict?*, by Claudia Copeland.

<sup>32</sup> U.S. Environmental Protection Agency, "Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges from the Application of Pesticides," 75 *Federal Register* 31775-31785, June 4, 2010.

<sup>33</sup> South Florida Water Management District v. Miccosukee Tribe of Indians, 124 S. Ct. 1537 (2004).

concerns in agricultural areas where such transfers often occur in supplying irrigation water, presently without a permit. Congress has not held oversight hearings on impacts of the Court's decision, and legislation that might address the ruling has not been introduced. In response to the Court's ruling, in June 2008, EPA promulgated a rule defining categories or types of water transfers that the agency believes do not require NPDES permits. The rule, which supports EPA's long-standing legal interpretation of the CWA, was quickly challenged in federal courts by the Miccosukee Indian Tribe of Florida and environmental advocates. A ruling in that litigation has not been issued.

However, in a related case, a federal appeals court ruled that pumping polluted water from canals in the Everglades into Lake Okeechobee without a permit does not violate the CWA. In its ruling, the U.S. Court of Appeals for the 11<sup>th</sup> Circuit (the same court that is hearing the direct challenge to EPA's water transfer rule) cited the rule and said that EPA's regulation is a reasonable, and thus permissible, construction of the language of the statute.<sup>34</sup> Environmental group plaintiffs in the case who oppose the EPA rule petitioned the 11<sup>th</sup> Circuit court for an *en banc* rehearing, and in October 2009 EPA officials told the court that the agency plans to reconsider the water transfer rule because of concerns about the water quality impacts of some water transfers.

## Responding to the Deepwater Horizon Oil Spill

On April 20, 2010, an explosion and fire occurred on the Deepwater Horizon drilling rig in the Gulf of Mexico. This resulted in 11 worker fatalities, a massive oil release, and a national response effort in the Gulf region by the federal and state governments as well as the oil company BP. Since the explosion of the rig, public and private efforts have focused on multiple response efforts to cap the undersea well and capture and contain the oil in order to prevent as much as possible of it from reaching shorelines. Congress has examined the response activities, events that preceded the explosion and spill, and policies that comprise the federal framework for responding to oil spills generally.<sup>35</sup>

The federal government's oil spill response framework is found in the National Contingency Plan, which contains the government's procedures for responding to oil spills and hazardous substance releases. The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) was established administratively in 1968, after U.S. policymakers observed the response to a 37-million-gallon oil tanker spill (Torrey Canyon) off the coast of England and saw the need for a coordinated approach to cope with potential spills in U.S. waters. Subsequent laws have broadened the NCP, including the Clean Water Act in 1972; the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund, 42 U.S.C. 9601 et seq.) in 1980; and the Oil Pollution Act (OPA, 33 U.S.C. 2701 note) in 1990. Thus, the statutory framework for responding to an oil spill derives principally from two laws: section 311 of the CWA established requirements for oil spill reporting, response, and liability, and established the NCP to coordinate the national response strategy; and OPA establishes liability limits (or caps) for oil spill removal costs and a range of other costs, such as injuries to natural resources. OPA consolidated the existing federal oil spill laws under one program, expanded the existing liability provisions within the CWA, and created new free-standing requirements regarding oil spill prevention and response. A number of other federal laws also are relevant, such as the Outer Continental Shelf Lands Act (OCSLA), which provides a system for regulating offshore oil and gas exploration, leasing, and ultimate development (43 U.S.C. § 1331 et seq.).

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<sup>34</sup> *Friends of the Everglades Inc. v. South Florida Water Management District*, 570 F.3d 1210 (11<sup>th</sup> Cir. 2009).

<sup>35</sup> For additional information, see CRS Report R41262, *Deepwater Horizon Oil Spill: Selected Issues for Congress*, coordinated by Curry L. Hagerty and Jonathan L. Ramseur.



Multiple committees in Congress considered a large number of bills that were introduced after the Deepwater Horizon oil spill. A wide range of issues were addressed, such as increasing existing liability limits for an oil spill (e.g., H.R. 5355 and S. 3305), streamlining claims assistance authority (e.g., S. 3375), expanding oil spill research programs to help develop cleanup technologies or prevent spills (e.g., H.R. 2693). The only bill enacted during the 111<sup>th</sup> Congress was a measure to advance monies from the existing Oil Spill Liability Trust Fund to pay costs related to oil spill removal (P.L. 111-191).

Many of the bills would have amended OPA, which is the primary domestic authority in this area, but several addressed CWA provisions, as well. For example, H.R. 5629, which was approved by the House Transportation and Infrastructure Committee on July 1, 2010, was a comprehensive bill that would among other provisions have raised OPA's liability limits, revised NCP procedures under the CWA to regulate chemical dispersants that may be used to mitigate a spill, and clarified federal agency responsibility under the CWA for oil spill response. (Provisions of H.R. 5629 were included in a broader measure, the Consolidated Land, Energy, and Aquatic Resources Act (H.R. 3454) that the House passed on July 30.) Another bill, H.R. 5608, would have required the President to revise the NCP to ensure that it incorporates consideration of worst case discharges; Area Contingency Plans, which are specific response plans for individual geographic areas, would similarly have been required to plan for worse case discharges. A third proposal, H.R. 5677, would have, among its provisions, required EPA to begin water quality monitoring within 48 hours of a spill in order to provide information about impacts on aquatic and other resources. It also would have required the President to update the NCP at least every five years.

Another bill, S. 3466, dealt with penalties and enforcement, but it would not have modified the CWA. It would have amended the Mandatory Victims Restitution Act of 1996 to add criminal offenses under the CWA to the statutory list of violations for which mandatory restitution of victims is required. It also would have directed the U.S. Sentencing Commission, which develops sentencing guidelines for federal prosecutors, to provide for compensation of victims for criminal violations of the CWA.

## **Continuing Issue: Appropriations**

Clean water issues also were addressed by Congress in the context of appropriations.<sup>36</sup>

### **FY2009 Appropriations**

President Bush's FY2009 budget was presented on February 5, 2008. Overall, the budget sought \$7.1 billion for EPA programs and activities, 5% less than Congress appropriated for FY2008. The request included a number of reductions for water quality programs. It sought \$555 million for the clean water SRF program (20% below the FY2008 level) and, as in previous budgets, requested no funding for congressionally earmarked water infrastructure grants. In addition, the budget asked for 8% less for nonpoint pollution management grants (\$184.5 million, compared with \$200.8 million in FY2008) and sought no funding for the targeted watershed grants program, a competitive grant program that provides funding for community-driven watershed restoration projects; it received \$10 million in FY2008 appropriations.

In June 2008, a House Appropriations subcommittee approved a bill with FY2009 funds for EPA. The bill included \$850 million for clean water SRF capitalization grants (\$295 million above the

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<sup>36</sup> For additional information, see CRS Report 96-647, *Water Infrastructure Financing: History of EPA Appropriations*, by Claudia Copeland.



Administration's request and \$161 million above the FY2008 level) and \$180 million for congressionally earmarked water infrastructure grants.

No further action occurred before the start of the new fiscal year, on October 1, 2008. However, at the end of September, Congress and the President agreed to legislation providing partial-year funding for EPA and most other agencies and departments. This bill, the Consolidated Security, Disaster Assistance, and Continuing Resolution Act, 2009 (P.L. 110-329), provided funding through March 6, 2009, at FY2008-enacted levels (i.e., \$689 million for clean water SRF grants). A second short-term CR was enacted on March 6 (P.L. 111-6), while Congress was finishing consideration of a full-year omnibus FY2009 appropriations bill that President Obama signed on March 11, 2009 (P.L. 111-8). It provided \$689 million in regular appropriations for the full year, but Congress also provided \$4.0 billion more in economic stimulus funds, which are discussed next. The 2009 omnibus appropriations act also included \$183.5 million for earmarked water infrastructure grants.

## **Economic Stimulus**

As the economy slid into recession in 2008, and fiscal problems began to affect all levels of government, states and cities have increasingly looked to the federal government for assistance in addressing the nation's faltering economic conditions. As a result, interest in using federal government spending to stimulate U.S. economic recovery intensified, and soon after taking office in January 2009, President Obama urged Congress to enact a multi-billion dollar fiscal stimulus bill. Among the options that were under discussion, many favored making accelerated investments in the nation's public infrastructure in order to create jobs while also meeting infrastructure needs. Legislative focus centered on providing supplemental appropriations for a wide range of government programs, including the clean water SRF program.

Because of the urgency of responding to the economic downturn, emphasis was on providing funds for projects that could move to construction quickly, which are often referred to as "shovel ready" or "ready to go" projects. To support arguments for generous spending levels in a stimulus bill, interest groups came forward with lists and estimates of "ready to go" projects. For example, state and local water agencies reportedly identified from \$9 to \$20 billion in wastewater treatment projects that are "ready to go."<sup>37</sup> Legislators moved quickly on these issues, because President Obama urged passage of economic stimulus legislation by mid-February 2009.

On January 28, 2009, the House passed H.R. 1, the American Recovery and Reinvestment Act, providing supplemental appropriations for a number of existing federal infrastructure and other programs, including \$6 billion for clean water SRF capitalization grants. On February 10, the Senate passed an amended version of the legislation, providing \$4 billion for clean water SRF grants, and on February 13, the House and Senate agreed to a reconciled version of the legislation providing \$4 billion for clean water SRF grants that will be available through September 30, 2010. President Obama signed the bill into law on February 17 (P.L. 111-5).<sup>38</sup>

Clean Water SRF funds provided in the bill were distributed to states according to the existing CWA state-by-state formulation that applies to regular SRF appropriations, but the bill waived the CWA requirement that states provide a 20% match to the federal capitalization grant. Also, the legislation allowed states to provide assistance to communities in the form of negative interest loans, principal forgiveness, grants, or a combination. States were to give preference to activities

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<sup>37</sup> Inside EPA, "States Seek over \$9 Billion for Clean Water Projects in Stimulus Bill," September 12, 2008.

<sup>38</sup> For additional information, see CRS Report R40216, *Water Infrastructure Funding in the American Recovery and Reinvestment Act of 2009*, by Claudia Copeland, Megan Stubbs, and Charles V. Stern.

that can start and finish quickly, with a goal that at least 50% of the funds go to activities that could be initiated within 120 days of enactment. Further, states were to give priority to wastewater projects that could proceed to construction within 12 months of enactment, and EPA was directed to redistribute any SRF capitalization grant funds that were not under contract or construction within that time. The legislation also directed states to use at least 20% of their capitalization grants to fund projects that address green infrastructure, water or energy efficiency improvements, or other environmentally innovative activities.

The supplemental clean water SRF funds provided by P.L. 111-5 were nearly six times larger than funds appropriated to states in the regular FY2009 appropriations act. Most state and local government officials welcomed the help provided by the stimulus funds in addressing long-standing infrastructure needs, but they noted that significant funding needs will remain even after the stimulus money has been spent. Despite the tight deadlines specified in the law, all states were able to meet the requirement that funds be under contract or construction by the one-year anniversary in February 2010; thus, EPA did not re-distribute any funds to other states.

## **FY2010 Appropriations**

President Obama delivered details of the Administration's FY2010 budget request on May 7, 2009. He requested \$10.5 billion in total funding for EPA.<sup>39</sup> The most significant investments in the FY2010 budget included funds for water infrastructure. Specifically, the budget sought \$2.4 billion for clean water SRF capitalization grants, nearly 2.5 times more than FY2009 appropriations. EPA estimated this funding level would finance 1,000 clean water projects. The budget also sought new funding for Great Lakes restoration efforts—requesting \$475 million for multiple programs and projects, including remediation of contaminated sediments (the Great Lakes Legacy Act would not be separately funded). About one-half of the total would be provided by EPA to other agencies for their Great Lakes programs and projects, such as the Department of Agriculture and Department of the Interior.

Congress reached final agreement on legislation providing EPA's FY2010 appropriation at the end of October 2009, several weeks after the start of the new fiscal year.<sup>40</sup> Congress agreed to provide \$2.1 billion for clean water SRF capitalization grants and \$187 million for congressionally directed water infrastructure special project grants. While providing substantial funding for wastewater projects, the bill also imposed conditions on how the money could be used. Building on requirements in the 2009 economic stimulus legislation, the bill directed that not less than 30% of the clean water SRF capitalization grants in excess of \$1 billion be used to provide additional subsidization in the form of negative interest loans, forgiveness of principal, or grants. Also, to the extent there were sufficient applications, not less than 20% of funds provided under a state's SRF program were to be used for green infrastructure, water efficiency, or energy efficiency improvements.

As passed, the bill included language requiring application of the Davis-Bacon Act's prevailing wage provisions for clean water projects. In November 2009, EPA issued policy guidance stating the agency's interpretation that, under the language as passed, prevailing wage rules would apply not only to assistance agreements funded with FY2010 appropriations, but also to all assistance agreements executed on or after October 30, 2009, and prior to October 1, 2010.<sup>41</sup> Industry

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<sup>39</sup> For details, see <http://www.epa.gov/budget/2010/2010bib.pdf>.

<sup>40</sup> At the end of September 2009, the House and Senate passed a continuing resolution to extend FY2009 regular funding levels for EPA and most other federal agencies and departments for one month, which the President signed on October 1 (P.L. 111-68).

<sup>41</sup> See [http://www.epa.gov/owm/cwfinance/cwsrf/davis\\_bacon.pdf](http://www.epa.gov/owm/cwfinance/cwsrf/davis_bacon.pdf).

groups and some states responded that, by applying the Davis-Bacon requirements retroactively, as well as forward, the policy memo was unnecessarily broad and would needlessly delay some projects. Criticism of EPA's guidance on Davis-Bacon applicability contributed to the Senate's failure to take action on CWA water infrastructure reauthorization legislation, S. 1005, discussed above.

The bill supported the President's \$475 million request for Great Lakes restoration. In connection with these funds, the House and Senate Appropriations Committees directed EPA to develop plans for spending the money and also directed EPA to report annually to Congress on program accomplishments and specific funding levels for participating federal agencies.

President Obama signed the bill on October 30, 2009 (P.L. 111-88).

## **FY2011 Appropriations**

President Obama presented his FY2011 budget request to Congress on February 1, 2010. Overall, the President's budget called for a freeze on non-security discretionary expenditures at EPA and other federal agencies. Consequently, the total request for EPA was \$10.02 billion, compared with \$10.3 billion enacted for FY2010.<sup>42</sup> The FY2011 request sought \$2.0 billion for clean water SRF capitalization grants, which was \$100 million less than FY2010, but still an increase above recent years' funding levels. As in the 2009 economic recovery legislation and the FY2010 regular appropriations, the President's budget requested that states use 20% of their capitalization grants for "green infrastructure" projects and also use 30% of assistance in the form of additional subsidization (such as loan forgiveness) to communities that face difficulties in paying for infrastructure projects.

One item that drew some congressional attention was the President's request for Great Lakes restoration. This funding would continue the initiative created in the FY2010 budget to target the most significant environmental problems of the Great Lakes ecosystem and to coordinate the work of multiple federal agencies in restoring the lakes. The budget requested \$300 million for these activities in FY2011, because most of the \$475 million appropriated in FY2010 was still uncommitted and unspent as of February 2010, when the FY2011 budget request was submitted. Only 8% of the 2010 funds had been obligated by that time, and some of that year's funds won't be spent until 2011, according to EPA.

Congress took only limited action on FY2011 funding for EPA before the start of the new fiscal year on October 1, 2010: a House Appropriations subcommittee approved a bill in July, but no further action followed. At the end of September 2010, the House and Senate passed a continuing resolution to extend FY2010 funding levels for EPA and other federal agencies and departments until December 3, 2010, because no FY2011 appropriations bills had been enacted by October 1. President Obama signed the continuing resolution on September 30 (P.L. 111-242). Two other short-term continuing resolutions were passed after December 3 (P.L. 111-290 and P.L. 111-317), while the House and Senate attempted to resolve appropriations issues for some portion or all of the remainder of FY2011. At the end of December, Congress passed a fourth continuing resolution that extends FY2010 funding levels for EPA and other agencies and departments through March 4, 2011 (P.L. 111-322). Thus, final resolution of FY2011 appropriations will occur early in the 112<sup>th</sup> Congress.

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<sup>42</sup> For information, see CRS Report R41149, *Environmental Protection Agency (EPA): Appropriations for FY2011*, by Robert Esworthy et al.

## Appendix. Current Clean Water SRF Allotment and Proposed Senate Revision

**Table A-1. Clean Water SRF Allotment**

Current Statutory Formula and Revised Formula Proposed in S. 1005 (111<sup>th</sup> Congress)

	Current Statutory Formula <sup>a</sup>	Current Statutory Formula at \$2.4 Billion <sup>b</sup>	S. 1005 Formula	S. 1005 Formula at \$2.4 Billion	Percentage Change: Current Statutory Formula to S. 1005
AL	1.1309%	\$27,141,600	1.2860%	\$30,864,000	13.71%
AK	0.6053%	\$14,527,200	0.7500%	\$18,000,000	23.91%
AZ	0.6831%	\$16,394,400	1.0247%	\$24,592,800	50.00%
AR	0.6616%	\$15,878,400	0.7500%	\$18,000,000	13.36%
CA	7.2333%	\$173,599,200	7.9629%	\$191,109,600	10.09%
CO	0.8090%	\$19,416,000	1.0164%	\$24,393,600	25.63%
CT	1.2390%	\$29,736,000	1.4150%	\$33,960,000	14.20%
DE	0.4965%	\$11,916,000	0.7500%	\$18,000,000	51.06%
DC	0.4965%	\$11,916,000	0.5000%	\$12,000,000	0.70%
FL	3.4139%	\$81,933,600	4.4139%	\$105,933,600	29.29%
GA	1.7100%	\$41,040,000	1.2825%	\$30,780,000	-25.00%
HI	0.7833%	\$18,799,200	0.8048%	\$19,315,200	2.75%
ID	0.4965%	\$11,916,000	0.7500%	\$18,000,000	51.06%
IL	4.5741%	\$109,778,400	4.8540%	\$116,496,000	6.12%
IN	2.4374%	\$58,497,600	2.4633%	\$59,119,200	1.06%
IA	1.3688%	\$32,851,200	1.0266%	\$24,638,400	-25.00%
KS	0.9129%	\$21,909,600	0.9129%	\$21,909,600	0.00%
KY	1.2872%	\$30,892,800	1.2025%	\$28,860,000	-6.58%
LA	1.1118%	\$26,683,200	1.3465%	\$32,316,000	21.11%
ME	0.7829%	\$18,789,600	0.7829%	\$18,789,600	0.00%
MD	2.4461%	\$58,706,400	2.5129%	\$60,309,600	2.73%
MA	3.4338%	\$82,411,200	2.5754%	\$61,809,600	-25.00%
MI	4.3487%	\$104,368,800	3.3487%	\$80,368,800	-23.00%
MN	1.8589%	\$44,613,600	2.0385%	\$48,924,000	9.66%
MS	0.9112%	\$21,868,800	0.9112%	\$21,868,800	0.00%
MO	2.8037%	\$67,288,800	2.8037%	\$67,288,800	0.00%
MT	0.4965%	\$11,916,000	0.7500%	\$18,000,000	51.06%
NE	0.5173%	\$12,415,200	0.8023%	\$19,255,200	55.08%

	Current Statutory Formula <sup>a</sup>	Current Statutory Formula at \$2.4 Billion <sup>b</sup>	S. 1005 Formula	S. 1005 Formula at \$2.4 Billion	Percentage Change: Current Statutory Formula to S. 1005
NV	0.4965%	\$11,916,000	0.7500%	\$18,000,000	51.06%
NH	1.0107%	\$24,256,800	0.7500%	\$18,000,000	-25.79%
NJ	4.1329%	\$99,189,600	4.6117%	\$110,680,800	11.59%
NM	0.4965%	\$11,916,000	0.7500%	\$18,000,000	51.06%
NY	11.1632%	\$267,916,800	10.3531%	\$248,474,400	-7.26%
NC	1.8253%	\$43,807,200	1.9007%	\$45,616,800	4.13%
ND	0.4965%	\$11,916,000	0.7500%	\$18,000,000	51.06%
OH	5.6936%	\$136,646,400	5.4722%	\$131,332,800	-3.89%
OK	0.8171%	\$19,610,400	0.8171%	\$19,610,400	0.00%
OR	1.1425%	\$27,420,000	1.2456%	\$29,894,400	9.02%
PA	4.0062%	\$96,148,800	4.1484%	\$99,561,600	3.55%
RI	0.6791%	\$16,298,400	0.7500%	\$18,000,000	10.44%
SC	1.0361%	\$24,866,400	0.7500%	\$18,000,000	-27.61%
SD	0.4965%	\$11,916,000	0.7500%	\$18,000,000	51.06%
TN	1.4692%	\$35,260,800	1.1019%	\$26,445,600	-25.00%
TX	4.6226%	\$110,942,400	3.7664%	\$90,393,600	-18.52%
UT	0.5329%	\$12,789,600	0.7500%	\$18,000,000	40.74%
VT	0.4965%	\$11,916,000	0.7500%	\$18,000,000	51.06%
VA	2.0698%	\$49,675,200	2.0698%	\$49,675,200	0.00%
WA	1.7588%	\$42,211,200	1.7588%	\$42,211,200	0.00%
WV	1.5766%	\$37,838,400	1.1825%	\$28,380,000	-25.00%
WI	2.7342%	\$65,620,800	2.2844%	\$54,825,600	-16.45%
WY	0.4965%	\$11,916,000	0.7500%	\$18,000,000	51.06
PR	1.3191%	\$31,658,400	0.5000%	\$12,000,000	-62.10%
Terr.	0.3809%	\$9,141,600	0.2500%	\$6,000,000	-34.37%

**Source:** Compiled by CRS.

**Note:** Dollar amounts in the table do not reflect 1.5% setaside for Indian Tribes under current law and S. 1005, which is reserved prior to distribution of remaining funds to states.

- a. Clean Water Act sec. 205(c)(3) (33 U.S.C. 1285(c)(3)). Actual current allotment percentages differ slightly from percentages in CWA section 205(c)(3), because EPA made administrative adjustment in FY2000 to reflect the fact that the Trust Territory of the Pacific Islands achieved status as a sovereign state and thus was no longer eligible for CWA funds. This adjustment gave each remaining eligible state an increase of about 0.13% to its allotment. For example, Alabama's statutory percentage, shown above, is 1.1309%, while its actual current allotment percentage is 1.1324%.
- b. Requested by the President for FY2010.

## **Author Information**

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